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IN THE

Supreme Court of the United States

No. 815

JAY E. DARLINGTON,

Petitioner,

vs.

STUDEBAKER-PACKARD CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
For the Seventh Circuit

(Opinion below is Appended Hereto)

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The above named Petitioner respectfully petitions this Court to issue its writ of certiorari to said Court of Appeals, to review the latter's decision reported in:

Darlington v. *Studebaker-Packard Corporation* (7 Cir. Jan. 2, 1959) 261 F. 2d 903.

There are no published opinions of the District Court in this case, but two short opinion-orders are contained in the Record Appendix, pages 50a-51a.

Grounds for Invoking This Court's Jurisdiction.

The Court of Appeals rendered and entered its opinion and judgment of affirmance against petitioner, plaintiff-appellant in this civil action, on January 2, 1958 (see Appendix of this petition). This Petition is filed ninety days thereafter, invoking this Court's general jurisdiction to review final judgments of Courts of Appeals under 28 U.S.C. 1254(1).

Questions Presented for Review.

The merits of petitioner's civil action as plaintiff in the District Court are not here involved. Petitioner seeks this Court's review of the Court of Appeals' affirmance following orders and judgment of the District Court:

(1)

The District Court made an *automatic* dismissal of petitioner's action under its *local Rule 11*, following which it denied his verified motion to vacate the dismissal. This final judgment, affirmed by the Court of Appeals, was challenged below, and is challenged here on the grounds:

(a) Local Rule 11 is invalid because it is *"inconsistent"* with the Supreme Court's *Rule 41(b) of Civil Procedure*, and hence is beyond the District Court's rule making power granted by Rule 83 of Civil Procedure. Hence, the judgment of dismissal and refusal to vacate the dismissal, *predicated solely* upon local Rule 11, constituted *a mal-administration of justice* in the District Court and a violation of petitioner's right of due process under the *Fifth Amendment.*

(b) Even if local Rule 11 be valid, it was an abuse of discretion to refuse to vacate the dismissal under the fact situation disclosed in petitioner's motion to vacate and in the preceding record.

(2)

The District Judge (Hon. Robert A. Grant, N.D. Ind.) denied petitioner's verified motion for him to disqualify himself because of the Judge's prior connection with defendant-respondent, making it improper for him to sit in the case (*28 U.S.C. 455*, Record Append. 42(a), 43(a), 45(a). The motion also alleged that the Judge was disqualified because of bias and prejudice against petitioner's case, under the related section, *28 U.S.C. 144*, Record Append. 44(a). The Judge's order refusing to disqualify himself was affirmed by the Court of Appeals (Appendix of this petition, p. 6a).

Petitioner urges here, that under the facts disclosed in the Record Appendix and on the face of the Court of Appeals' opinion, this order was erroneous, resulting in a *maladministration of justice* in the District Court, which constituted a denial of his right of due process under the *Fifth Amendment*.

The above questions (1)(a) and 2 go to alleged maladministration of justice and denial of petitioner's right under the Fifth Amendment, and hence, we think, they merit this Court's attention.

If question (1)(a) is determined in favor of petitioner, this would suffice to require reversal, though it would be within this Court's power also to consider 2 if it deemed this advisable for the purpose of clarifying the Judge's future status in the case.

Similarly, a determination of question 2 in petitioner's favor would require a reversal without the need of determining (1)(a) or (b), though a determination of (1) would be within the court's power and probably desirable for future guidance of the lower courts in the case.

Rules Involved in Question (1) (a):

District Court's Local Rule 11:

"Dismissal of Civil Cases Because of Lack of Prosecution. Civil cases in which no action has been taken for a period of one year *may* be dismissed *for want of prosecution* with judgment for costs after thirty days notice *given by the clerk* to the attorneys of record *unless*, for good cause shown, the court orders otherwise." (Our emphasis).

Rule 11, U.S. District Court (N.D. Ind.) 1955 Edition.

Applicable Rules of Civil Procedure.

"*Rule 83. Rules by District Courts.*

"Each district court by action of a majority of the judges thereof may from time to time made and amend rules governing *its* practice not *inconsistent* with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases *not provided for* by rule, the district courts may regulate their practice in any manner *not inconsistent* with these rules." (Our emphasis).

Commentaries

* * * * *

"The intention of the Committee was to provide a simple, *unified* system which would be governed by a *single*, brief body of rules. The Federal Rules of Civil Procedure do not, however, cover all situations. *To the extent* that the new rules, together with the federal statutes, *do not regulate the practice* and pro-

cedure, the district courts are permitted to formulate their own rules. * * * Daniel H. Hopkinson, *23 Marq. L. Rev. 159.*" (Our emphasis).

Rule 83, Federal Rules of Civil Procedure and Commentaries, 28 U.S.C.A. pp. 504-505.

Rule 41. Dismissal of Actions.

(*a*) *Voluntary Dismissal: Effect Thereof.*

"(1) *By Plaintiff: By stipulation.* Subject to the provisions of Rule 23 (c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff *without order* of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. As amended Dec. 27, 1946, effective March 19, 1948.

"(2) *By Order of Court. Except* as provided in paragraph (1) of this subdivision of this rule, an action *shall not be dismissed* at the plaintiff's instance *save upon order* of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can

remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary Dismissal: Effect Thereof.*

"*For* failure of the plaintiff *to prosecute or* to comply with *these* rules or *any order* of court, *a defendant may move* for dismissal of an action or of any claim against him. * * * Unless the court in its *order* for dismissal otherwise specifies, a dismissal under *this* subdivision and *any* dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an *adjudication* upon the *merits*. As Amended Dec. 27, 1946, effective March 19, 1948." (Our emphasis).

Rule 41 of Civil Procedure, 28 U.S.C.A., pp. 203-204.

Rule Involved Under Question 1(b):

Rule 60. Relief from Judgment or Order.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* "On *motion* and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, *order,* or proceeding for the following reasons: (1) *mistake, inadvertence,* surprise, or *excusable neglect;* * * * (4) the judgment is *void;* * * * or (6) *any other reason* justifying relief from the operation of the judgment. The motion shall be made within a *reasonable* time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. * * *" (Time was enlarged from six months to one year by 1946 amendment).

Rule 60(b) of Civil Procedure, 28 U.S.C.A., pp. 310-313.

Statutes Involved in Question (2):

§455. *Interest of justice or judge.*

"Any justice or judge of the United States *shall disqualify* himself in *any* case in which he has a substantial interest, has been of counsel, is or has been a material witness, *or* is so related to or connected with any party or his attorney as to render it *improper,* in his opinion, for him to sit on the trial, appeal, or other proceeding therein." June 25, 1948, c. 646, 62 Stat. 908 (Our emphasis).

28 U.S.C. 455.

§144. *Bias or prejudice of judge.*

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith." June 25, 1948, c. 646, 62 Stat. 898, as amended May 24, 1949, c. 139, §65, 63 Stat. 99.

28 U.S.C. 144.

STATEMENT OF FACTS.

Action by plaintiff-appellant for accounting for profits and damages for alleged patent infringement. Case was dismissed before trial, for alleged delay in prosecution, *solely under Local Rule 11*, from which plaintiff appeals.

Since the complaint was not dismissed on the merits, or disposed of in any fashion on the merits, it does not appear necessary to summarize here at length the contents of the pleadings, except for the incidental purpose of showing the nature and size of the case as bearing upon some aspects of the delay in prosecution.

Complaint.

Filed December 31, 1952. Alleges that defendant, The Studebaker Corporation, has infringed a design patent issued on June 14, 1949 to Tucker Corporation and assigned by the latter's trustee to the plaintiff pursuant to order of United States District Court (N.D. Ill.).

Prayer for accounting for profits and damages arising from the infringement.

Record Appendix, p. 1a.

Answer.

Filed February 20, 1953, after stipulated extension of time. Admits that the patent issued but denies the alleged infringement, and alleges that the patent is invalid for lack of invention and that the same design was covered in a large number of specified patents and publications in this country and foreign countries.

Record Appendix, pp. 3-8a.

The next step in the case was a Clerk's entry on September 1, 1953 reciting that the case was placed on the trial call calendar for the October 1953 term, "*and no request for trial was received.*"

Record Appendix, p. 8a.

Substitution of New Defendant and Counsel.

No further action occurred in the case until March 4, 1955 when an order was entered substituting the defendant's successor, Studebaker Packard Corporation, as the defendant.

This was followed on June 9 and 23, 1955 by an order and entry substituting a completely new set of defense counsel.

Record Appendix, pp. 8-10a.

Defendant's Interrogatories and Requests for Admissions.

No further action occurred in the case until, January 20, 1956, when the defendant filed 20 interrogatories and 101 requests for admissions, directed to the plaintiff, the two documents being very long and involved.

Record Appendix, pp. 10-28a.

On April 23, 1956, time having been extended (Tr. 63-74), plaintiff filed answers and responses to these interrogatories and requests.

Record Appendix, pp. 28-35a.

Clerk's Notice Under Local Rule 11.

The next action in the case was a mimeographed form notice sent on May 2, 1957 by the Clerk to the parties (Tr. 82):

"You are hereby notified that this cause *will* be dismissed on Thursday, June 6, 1957, pursuant to Rule 11 of this court, *unless prior thereto,* for good cause shown, the court *orders otherwise.* (Our italics).

/s/ Kenneth Lackey, Clerk"

Record Appendix, p. 36a.

The text of Local Rule 11, similar to the above language, is set out at page 4 *supra.*

Dismissal Order.

On June 6, 1957 an order, *apparently automatic* and without the presence of either side, was entered, which reads:

"*Pursuant to notice given under Rule 11* of the Rules of this Court, cause dismissed for failure to prosecute at the costs of the plaintiff. (Our italics)

/s/ W. Lynn Parkinson, Judge"

Record Appendix, p. 37a.

Motion to Vacate Dismissal.

On June 21, 1957, plaintiff filed his verified motion to vacate the dismissal under ~~Rule 60~~ (b) of Civil Procedure, alleging facts to show the impossibility of complying with Local Rule 11 at an earlier date. This motion is discussed at more length under pages 19-20, *infra.*

Record Appendix, pp. 38-40a.

Hearing and Denial of Motion to Vacate.

In the latter part of 1957, after the entry of the aforesaid dismissal order and filing of the motion to vacate it, and before the motion came on for hearing, the Judge who entered the dismissal order, Hon. W. Lynn Parkinson, was appointed to the United States Court of Appeals for the Seventh Circuit, and was succeeded as District Judge by Hon. Robert A. Grant.

The motions to vacate was heard by Judge Grant on oral arguments on March 14, 1958, with time given to April 14 for plaintiff to file any desired memorandum of authorities and defendant given until May 5 to file any reply memorandum of authorities.

Record Appendix, p. 41a.

An order was entered by Judge Grant on May 9, 1958 denying plaintiff's motion to vacate the dismissal.

Record Appendix, p. 51a.

Plaintiff's Motion for Judge to Disqualify Himself, and Order Overruling Same.

On April 14, 1958, during the interval between the aforesaid oral argument on March 14 and the order denying the motion to vacate the dismissal on May 9, the plaintiff filed a verified motion requesting said Hon. Robert A. Grant to disqualify himself to rule upon the pending motion and at future stages of the case, under 28 U.S.C.A. 455, because of the Judge's previous employment by the defendant, which fact first came to plaintiff's knowledge after the oral argument of May 14. This subject is covered in more detail under part II of the Argument, p. 22, *infra*.

Record Appendix, pp. 42-46a.

The defendant, in Part III of its brief, filed on April 23, 1958, admitted the alleged employment of the Judge before his appointment to the bench, but argued that this was insufficient to disqualify him. (No other factual response was filed to plaintiff's motion. The "brief" was not verified.)

Record Appendix, pp. 47-50a.

On May 8, 1958 (the day preceding the aforesaid denial of the motion to vacate the dismissal), the Judge

entered an order overruling the motion for him to disqualify himself. The order, in language of 28 U.S.C.A. 455, categorically denies the statutory causes for disqualification, with no factual amplification.

Record Appendix, p. 50a.

Appeal.

Notice of appeal was filed on June 7, 1958, from both of the above orders,—the order of May 8 overruling plaintiff's motion for disqualification, and the order of May 9 denying plaintiff's motion to vacate the dismissal.

Record Appendix, p. 52a.

REASONS FOR ALLOWANCE OF WRIT.

Summary.

I.

The District Court erred in denying plaintiff's Motion to Vacate the Dismissal Order.

A.

Local Rule 11, which was the *sole* actual *basis* of the dismissal, was and is invalid because it is "inconsistent" with the Supreme Court's *Rule 41(b) of Civil Procedure*. It was beyond the local rule-making power granted by the Supreme Court to the District Courts under *Rule 83 of Civil Procedure*.

We find no reported decision construing or deciding the validity of Local Rule 11, but basic principles, as well as decisions on the analogous question of abatement, seem to sustain our position:

Messenger v. *United States* (2 Cir. 1956) 231 F. 2d 328, 329, point 1).

Hackner v. *Guaranty Trust Co. of N. Y.* (2 Cir. 1941) 117 F. 2d 95, 99.

The question here is not the general power of District Courts to dismiss for delay in prosecution outside of Rule 41(b) of Civil Procedure. The question is the validity of Local Rule 11 as it was applied in this case.

B.

If Local Rule 11 was valid, the District Court nevertheless abused its discretion in refusing to vacate the dismissal.

Langnes v. *Green*, 282 U.S. 531, 541-2, 51 S. Ct. 243.

Note: If the above point A is well taken, it disposes of the appeal and renders point B moot.

If either point A or point B are well taken, they dispose of the only final judgment presently existing in the case, the appeal and renders point II moot.

II.

The District Judge erred in overruling plaintiff's motion requesting him to disqualify himself.

28 USC 455.
28 USC 144.

ARGUMENT.

I.

Error in Denying Plaintiff's Motion to Vacate Dismissal.

A.

Invalidity of Local Rule 11.

For texts of Rule 11 and applicable Rules of Civil Procedure, see pages 4-6, *supra*.

As appears on the face of the above *Rule 83 and Commentaries* the Supreme Court's purpose was a simple,

unified, uniform system of Civil Procedure. The only field left to the District Court's rule making power was in matters "not inconsistent" with, or "not provided for" in the Rules of Civil Procedure.

The purpose and logic of the situation appears to be that *general* procedural problems which are *common* to the various Districts should be governed by the Rules of Civil Procedure. The only *need* for local rules is to cover *local* problems, and even in this field the District Courts are circumscribed by the "not inconsistent" requirement of Rule 83.

The entire subject of dismissal of civil actions, voluntary and involuntary, including dismissal "for failure of the plaintiff to prosecute", is covered in Rule 41 of Civil Procedure. Quoted at page 5, *supra*.

Comparison of Rule 41(b) with Local Rule 11.

Since it is fundamental that appellate courts deal with *the actual, concrete situation* presented in the record coming up from below, and they refuse to decide "might have been" questions which are not required for disposal of the appeal,—the actual question here is whether Local Rule 11 *as applied* in this case was invalid, (though if required for disposal of the appeal, we contend, and we think it is plain, that Local Rule 11 is basically and totally invalid).

Although Local Rule 11 says the case "may" be dismissed, the *actual practice* under the rule apparently was for the *Clerk* to go through the docket and send out mimeographed notices (Tr. 82a) that cases "will" be dismissed under Local Rule 11.

Record Appendix, p. 36a.

The order of dismissal also shows on its face that it was an *automatic* type of order, entered *without motion*

of any part without the *presence* of any party,—and what is more important, without the Judge having or taking the opportunity to perform the important judicial function of considering the *nature, progress* and *status* of the case,—matters which could adequately become known to the Judge only upon a *motion* of the defendant to dismiss, or upon a pre-trial conference,—neither of which ever occurred in this case, as shown by the complete record which was designated and certified up.

Also, in approaching this comparison of *Rule 41(b)* and Local Rule 11, we believe it is logical and important to bear in mind that:

(a) The limit which *Rule 83* places on local rule-making power is that the latter be "not inconsistent". They need not be in head-on collision with the Rules of Civil Procedure.

(b) Inconsistency can, and often does, exist not so much in violating the letter but the general scope and tenor of the superior document.

(c) The rights of a litigant are defined (and protected) not only by what the Rules of Civil Procedure require, but what they do *not* require of a litigant. This cautionary feature is many times stated in these Rules. It is implicit in all of them, including Rule 41(b).

We respectfully urge that, tested by these standards and by all accepted standards, Local Rule 11, as applied in this case, is "inconsistent" with Rule 41(b) and with the general body of the Rules of Civil Procedure in obvious, fundamental respects, including the following:

(1)

It contemplated, and produced, an arbitrary automatic dismissal, *based upon an arbitrary period of one year,* without regard to the *nature, progress* or *status* of the case.

A reference to these factors would have shown that the case was a large and complicated one, wherein both the *court* and the *defendant* had allowed long periods to elapse without protest or invoking Local Rule 11, far exceeding the one year and two weeks of "delay" for which the plaintiff was arbitrarily thrown out of court.

This Petition, *supra*.

Record Appendix, pp. 3-9, 28, 36a.

On the other hand, *Rule 41(b) does* not fix any arbitrary *period* standard, nor any such *automatic* dismissal.

(2)

Under Local Rule 11, as applied here, the moving party was the District Court's *Clerk*, whereas, under *Rule 41(b)*, the motion must come from the *defendant* or a like party, (as such an initiative should come, unless we are to convert the federal courts into arbitrary assembly lines or transmission belts).

This procedure, plainly specified by Rule 41(b), obviates the evils above mentioned under (1).

While we find no precedent in point on this conflict between Local Rule 11 and Rule 41(b), we find many cases which *take it for granted* that the dismissal procedure is controlled by Rule 41(b), and also the following dealing with the analogous subject of conflict between local rules and the Rules of Civil Procedure regarding *abatement* of actions:

> "After the adoption of the Rules, *some* of the *District* Courts adopted rules providing that actions *should abate* unless service be completed within a *specified time* after filing the complaint. *Cf. Koster* v. *(American) Lumbermens Mut. Casualty Co.*, 2 Cir., 153 F. 2d 888. But in *Hackner* v. *Guaranty Trust Co.*

of New York, 2 Cir., 117 F. 2d 95, 96, *we questioned the validity of such rules.* That question it is not necessary now to decide since no such rule has been invoked in this case. However, the cases just cited hold that after the filing of the complaint, *the action remains pending in an inchoate state* until service is completed unless *and until* the action is dismissed for failure to prosecute *under Rule 41(b)*. The same holding is implicit in *Munro* v. *United States*, 303 U.S. 36, 58 S.Ct. 421, 82 L. Ed. 633, and *Bates Mfg. Co.* v. *United States*, 303 U.S. 567, 58 S.Ct. 694, 82 L. Ed. 1020.

* * *

"Holding, as we do, that service on the United States was never accomplished, clearly the court below was warranted in dismissing for failure to prosecute *under Rule 41(b)*. For some six years there has been a complete lack of any prosecutory effort; not even service of the action has been accomplished. *Under Rule 41(b)*, a motion to dismiss may be granted for lack of *reasonable* diligence in prosecuting. * * *"

Messenger v. United States (2 Cir. 1956) 231 F. 2d 328, 329, 330-331.

"* * * Now under the *rules* an action once commenced by the filing of a complaint—which is what Eastman's 'amendment' amounted to—*remains pending until dismissed by the court* under *Rule 41(b)* for lack of due diligence in prosecution. *Cf. Bates Mfg. Co.* v. *United States*, 303 U.S. 567, 572, 58 S. Ct. 694, 82 L.Ed. 1020; 51 Harv. L. Rev. 1087; *Linn & Lane Timber Co.* v. *United States*, 236 U.S. 574, 578, 35 S.Ct. 440, 59 L.Ed. 725; *Genesee Valley Trust Co. of Rochester* v. *United States*, 2 Cir., 116 F. 2d 407, December 23, 1940." (Our emphasis.)

Hackner, v. Guaranty Trust Co. of New York (2 Cir. 1941) 117 F. 2d 95, 99.

Opposing cases distinguished:

Some cases, including one or two cited in the order denying the motion to vacate dismissal, refer to the "inherent power" of a District Court to dismiss for lack of prosecution. None of them involve a comparable fact situation. They were cases where the plaintiff was grossly in default or was purposely dallying with a frivolous complaint. Moreover, in most instances, the District Court acted upon an existing or preceding motion of the defendant for relief from the plaintiff's misconduct (there never was any such motion in the case at bar).

So the situation in those cases was appropriate for application of *Rule 41(b)*, though dismissal was predicated loosely upon "inherent power," an expression which, if not confined to the facts in the cases, obviously collides with the letter and purpose of *Rule 83 of Civil Procedure.*

Hicks v. *Bekins etc. Co.* (9 Cir. 1940), 115 F. 2d 406, the only case cited in the Court of Appeal's opinion on the "inherent power" doctrine, bases itself on *Blackstone,* plus one Second Circuit decision which preceded the recent revisions of the Rules of Civil Procedure, and which is contrary in effect to later decisions of the Second Circuit, quoted *supra.*

Further, the dismissal in our case was predicated expressly and solely upon Local Rule 11, so there is not now before this Court any questions as to the existence or scope of the District Court's "inherent power" of dismissal.

In fact, the "inherent power" doctrine implies that the District Court applies judicial consideration to each individual case, which is the antithesis of the one-year automatic dismissal practice applied in this case.

B.

If Local Rule 11 was valid, it was nevertheless an abuse of discretion to refuse to vacate the dismissal under the fact situation shown in plaintiff's Motion to Vacate the Dismissal.

Rule 60 (b) of Civil Procedure provides a comprehensive, flexible, liberal procedure for relief from all kinds of judgments and orders. Its more applicable provisions are:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, *order*, or proceeding for the following reasons: (1) *mistake, inadvertence,* surprise, or *excusable neglect;* * * * (4) the judgment is *void;* * * * or (6) *any other reason* justifying relief from the operation of the judgment. The motion shall be made within a *reasonable* time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. * * *" (Time was enlarged from six months to one year by 1946 amendment).
>
> **Rule 60(b) of Civil Procedure, 28 U.S.C.A., pp. 310-313.**

Obviously, the above Rule affords ample procedural basis for granting us relief either on the theory that the District Court committed a mistake in dismissing the case under an invalid Local Rule, so that the dismissal was perhaps void or certainly erroneous, as contended in Point A, *supra*; or on the theory that the plaintiff committed a mistake, inadvertence or excusable neglect, as contended in the present Point B.

While the Motion to Vacate the Dismissal deals only with the *factual* grounds covered in Point B, because it was prepared in haste before the plaintiff had an opportunity to study the *law* question as to the invalidity of

Local Rule 11,—a question of the latter type requires no formal pleading, and this law question was in fact *argued orally* at the hearing of March 14, 1958 and in subsequent briefs of both sides, and the question was entertained by Judge Grant,—in fact it was the only question he would listen to. (See Record Appendix, middle of page 4a).

On the question presented by the present Point B,—mistake, inadvertence or excusable neglect of a party or attorney,—it is inherently impossible to lay down any hard and fast boundaries, and no two fact situations are alike, so precedents are not controlling one way or the other.

The standard of sound judicial discretion has been defined by the Supreme Court as—

> "what is right and equitable *under the circumstances* and the law, and directed by the reason and conscience of the Judge to *a just result.*" (Our emphasis).
>
> *Langnes v. Green*, 282 U.S. 531, 541-2, 51 S. Ct. 243.

The motion to vacate the dismissal, filed on June 21, 1957, promptly after the dismissal order of June 6, 1957, made a strong, sworn factual showing that earlier compliance by the plaintiff with Local Rule 11 had not been reasonably possible, and that the dismissal had occurred through mistake, accident and excusable neglect on his part, because, among other things:

> "*Continuously* since January 3, 1957, until the present time, the plaintiff, Jay E. Darlington, an attorney practicing at Hammond, Indiana, has been under a continuous and heavy burden of trial work and matters immediately connected therewith, which could not be avoided or delayed, including principally the case (specifying cases in the District Courts in Chicago,

Miami and Puerto Rico). * * * Due to this situation and the burdens of said other litigation, plaintiff overlooked the requirement of taking action in this case under Rule 11, and if it had not escaped his attention, *it would not have been possible anyhow to take such action within said time*, due to the aforesaid situation of the plaintiff. * * *"

Record Appendix, pp. 38-39a.

There is more factual matter in this Motion to Vacate the Dismissal, for which we respectfully refer the Court to the Appendix, pp. 38-40.

If the plaintiff had been able to prepare and *file* the above showing a few days *before* the dismissal of June 6, 1957, it certainly *should* have sufficed to constitute the undefined "good cause" mentioned in Local Rule 11 (p. 10, *supra*). This would have been true even though the plaintiff's filed response had been held in abeyance and its sufficiency not ruled upon by the Court until May 9, 1958.

Then why should not the same showing filed a few days *after* the dismissal be accepted by the District Court, particularly in view of the showing of inability to file it sooner, plus the fact that the entry sought to be vacated was an automatic formal one involving no hearing and no labor or hardship imposed upon the Court or the defendant.

II.

Error in Judge's Refusal to Disqualify Himself.

The relation of this question to the ones already discussed is this:

If it be determined that Local Rule 11 was valid, and that the Court of Appeals cannot say that the District Court abused its discretion,—then we come to this final question:

Was the plaintiff deprived of his right to have a fair and impartial Judge *exercise* the discretion?

It is no answer to say that the Court of Appeals does not find from the record that the discretion was *abused*.

It is precisely in *discretionary* matters that a totally fair and impartial frame of mind in the District Judge is most *needed* and most important,—to the parties, to the public and to the reviewing courts.

The principal applicable statute is *28 U.S.C.A. 455*, quoted at page 7, *supra*. As shown in the annotations in U.S.C.A., this statute has undergone progressive amendments and clarifications in the direction of disqualifying Judges.

Hence, earlier decisions against disqualification are likely to be out of point.

The factual basis is concisely set forth in the "Plaintiff's Verified Motion for the Judge to Disqualify Himself," to which reference is made to avoid needless repetition here.

Record Appendix, pp. 42-46a.

The only factual response by the defendant to this motion is an admission in its unsworn Brief which considerably strengthens the motion.

Record Appendix, p. 47a, middle.

It is not essential to disqualification to show that the Judge has been counsel in the *case*, or that he has any *direct* connection with a party, as the Court of Appeal's opinion erroneously assumes (page 6a, *supra*). The statute aims at the possible *indirect* sources which *might* bias or influence a Judge. It requires:

"Any judge * * * *shall* disqualify himself in *any* case in which he * * * is * * * so related to *or con-*

nected with any party * * * as to render it *improper*, in his opinion, for him to sit on the trial, appeal, or other proceedings therein."

28 U.S.C.A. 455.

Necessarily, the statute leaves this matter to the Judge's "opinion" in the first instance, and most (not all) Courts of Appeals hold that the matter is not reviewable *until* the case comes up on appeal from a final judgment. But it is universally recognized, we believe, that the matter *is* reviewable,—otherwise the statute would be a mockery.

No factual light or disclosure of facts is contained in the Judge's order overruling the Motion to Disqualify,—only categorical denials couched in the language of the statute.

Plaintiff was entitled to obtain, and we believe this Court ought to have a more complete factual picture of the admitted prior connection between the Judge and the defendant. (Record Appendix, p. 50a).

This apparently was not a routine legal retainer but one of *confidential* and *important nature*, as shown in plaintiff's motion.

Record Appendix, pp. 42-43a.

This feature seems to be circumstantially corroborated by the admission of defendant's counsel that he had not known of the connection prior to reading it in plaintiff's motion.

Record Appendix, p. 47a, middle.

In the light of these undisputed facts, the plaintiff is not bound, and *this Court* is not aided, by the self-serving, conclusory statement in defendant's Brief that the undefined "certain legal matters" in which the present Judge was admittedly acting for the defendant "continuously from July 1950 to the end of 1954" had "no connection whatsoever with the *present case*". (Record Appendix, p. 47a).

The statutory test is not "connected with the present *case*," but "connected with any *party*".

The defendant could have, and we think should have, filed a frank factual response to plaintiff's motion in this unusual situation.

The Judge, while not required to do so, could properly have clarified the factual picture by filing a factual memorandum with his order refusing disqualification. Such factual disclosures are often freely volunteered, usually orally in open court, by Judges when questions arise concerning possible interest or connection of the Judge. No factual disclosure of any kind has ever been made on this subject by the Judge in this case, except the recitals in the order.

Or, the Judge could have ordered the defendant to file an adequate factual response.

The plaintiff's motion showed the need for discovery and prayed discovery of these matters under Rule 34.

Record Appendix, p. 43a, par. 3, and p. 45a, par. 2.

The defendant's Brief, while not itself making any adequate factual disclosure, expressly stated that it "would *have no objections* to any discovery *order* with regard to inspecting defendant's *records* as requested by plaintiff" except that the scope be not too broad and burdensome.

Record Appendix, p. 49a, bottom.

Yet the Court ignored plaintiff's prayer and defendant's consent and simply entered the order refusing disqualification.

In this situation, we believe the only fair and feasible remedy is the doctrine that *facts not disclosed* by the party *or person* having the *power* of disclosure will be assumed to be in favor of the party seeking the disclosure.

Thus aided, or even without such aid, we believe that the facts presented in plaintiff's motion and admitted in defendant's brief, with the fair factual inferences therefrom, clearly entitled the petitioner to have his Motion to Disqualify granted.

This is not a situation where a Judge *merely* sits in judgment where his "former client" is a party, as the Court of Appeals' opinion fallaciously holds upon the sole authority of an old and inapplicable case, *Carr v. Fife* (1894) 156 U.S. 494, 498.

While, as above shown, the statutory test is not the Judge's connection with the case before him, the record raises a strong factual inference that the Judge did have a peculiar, unexplained connection with the subject matter of this action, namely:

1. The complaint charges that from the time this Tucker automobile design patent issued on June 14, 1949 until this action was filed on December 31, 1952, defendant had infringed it in its Studebaker *automobile*.

Record Appendix, p. 1a.

2. Plaintiff-petitioner's "Motion for the Judge to Disqualify Himself" alleged that the Judge's employment by Studebaker *from 1950* to 1954 or 1955 was in a legal or "quasi-legal" capacity, in "procurement or negotiation" of contracts for the defendant to supply motor vehicles including Studebaker *automobiles* to government agencies, and that such contracts resulted from this work by him.

Record Appendix, p. 42a.

3. Defendant's responding brief admitted its employment of the Judge "continuously from July 1950 to the end of 1954". *It does not deny* plaintiff's above factual allegations as to the *nature* of the Judge's work. It merely makes the *conclusory*, self-serving, *unexplained* statement that his work was on "matters having no connection" with this case.

Record Appendix, p. 47a.

4. From these facts, plus the *silence* of the defendant and the Judge as to the actual facts, known only to them, —it seems a fair factual inference that the Judge's work and the result of his work, *included the sale of a number of these infringing Studebaker automobiles* to the government, since the admitted period of his work covered two and a half years of the period of infringement.

Wherefore, for each of the aforesaid reasons, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to review and reverse said decision and judgment of the Court of Appeals, and for all other just and proper relief.

Owen W. Crumpacker,
Attorney for Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JAY E. DARLINGTON,
Plaintiff-Appellant,
v.
STUDEBAKER-PACKARD CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

January 2, 1959

Before MAJOR, SCHNACKENBERG and HASTINGS, *Circuit Judges.*

HASTINGS, *Circuit Judge.* On December 31, 1952, Jay E. Darlington, plaintiff-appellant, as assignee of a certain design patent, filed an action against the predecessor of Studebaker-Packard Corporation,[1] defendant-appellee, in the United States District Court for the Northern District of Indiana, South Bend Division, charging infringement of such patent with a prayer for an accounting of profits and damages arising therefrom. Since the chronology of subsequent steps taken in the case below leading to this appeal is important, we list those steps in proper sequence:

(1) On February 20, 1953, defendant filed its answer of admission and denial.

(2) On September 1, 1953, a clerk's entry recited that the case was placed on the trial call calendar for the October 1953 term, "and no request for trial was received."

(3) On March 4, 1955, an order was entered substituting the defendant's successor, Studebaker-Packard Cor-

[1] The Studebaker Corporation.

poration, as defendant, followed by entries on June 9 and 23, 1955, substituting new defense counsel.

(4) On January 20, 1956, defendant filed 20 interrogatories and 101 requests for admission, directed to plaintiff, who, on April 23, 1956, filed his answers and responses thereto.

(5) On May 2, 1957, the following notice was sent to the parties by the Clerk:

> "You are hereby notified that this cause will be dismissed on Thursday, June 6, 1957, pursuant to Rule 11 of this court, unless prior thereto, for good cause shown, the court orders otherwise.
>
> /s/ Kenneth Lackey, Clerk."

(It is undisputed that Darlington's counsel received this notice and that no response was made thereto.)

(6) On June 6, 1957 the action was dismissed under the following order:

> "Pursuant to notice given under Rule 11 of the Rules of this Court, cause dismissed for failure to prosecute at the costs of the plaintiff.
>
> /s/ W. Lynn Parkinson, Judge."

(7) On June 11, 1957, defendant filed its bill of costs and verification thereof.

(8) On June 21, 1957, plaintiff filed his verified "Motion to Vacate Dismissal."

(9) On March 14, 1958, oral argument on the motion to vacate the dismissal was heard by Judge Robert A. Grant (successor to Judge Parkinson on the district bench) and time was given to file briefs.

(10) On April 14, 1958, plaintiff filed his motion for Judge Grant to disqualify himself from ruling on the pending motion and from acting further in the case because of alleged prior employment of him by defendant in other matters.

(11) On April 23, 1958, defendant filed its brief in opposition to both of plaintiff's pending motions, admit-

ting that its predecessor defendant had paid Judge Grant a retainer of $400 per month "to handle certain legal matters having no connection whatsoever with the present case continuously from July 1950 to the end of 1954."

(12) On May 8, 1958, Judge Grant overruled plaintiff's motion that he should disqualify himself under the following order:

> "Plaintiff's Motion For the Judge to Disqualify Himself is hereby overruled, as the present occupant of this bench:
>
> (1) Has no interest in this present action;
>
> (2) has not been of counsel as to this action and has not been a material witness therein;
>
> (3) has not been and is not now, to his knowledge and in his opinion, so connected with any party in this matter, or any attorney herein, as to render it improper for the present occupant of this bench to preside in this matter."

(13) On May 9, 1958, an order was entered denying plaintiff's motion to vacate the order of dismissal.

Plaintiff now appeals from the orders of May 8 and 9, 1958, alleging errors by the district court in the denial of each of his motions for disqualification and to vacate.

Although defendant has not filed a motion to dismiss this appeal, it challenges our jurisdiction to hear the appeal on the ground that it is not from any final decision of the district court pursuant to 28 U.S.C.A. § 1291. However, plaintiff's motion to vacate the order of dismissal was filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., on the ground of mistake, inadvertence, or excusable neglect and for other reasons claimed to justify relief from the dismissal. It is well established that such a motion is addressed to the sound legal discretion of the trial court and courts of appeal have frequently reviewed the exercise of such discretion, holding that the ruling on the motion will not be disturbed upon appeal except for an abuse of this

discretion. *Parker* v. *Checker Taxi Company, Inc.*, 7 Cir., 238 F. 2d 241 (1956); *Jones* v. *Jones*, 7 Cir., 217 F. 2d 239 (1954); *Cole* v. *Fairview Development, Inc.*, 9 Cir., 226 F. 2d 175 (1955); *Stafford* v. *Russell*, 9 Cir., 220 F. 2d 853 (1955); *Weilbacher* v. *J. H. Winchester & Co., Inc.*, 2 Cir., 197 F. 2d 303 (1952); *Cromelin* v. *Markwalter*, 5 Cir., 181 F. 2d 948 (1950). Cases cited by defendant are in applicable for the reason that they do not involve Rule 60(b).

Rule 11 of the district court, under which this action was dismissed, appears in the September 1, 1955 Edition of the rules of that court as follows:

> "Dismissal of Civil Cases Because of Lack of Prosecution. Civil cases in which no action has been taken for a period of one year may be dismissed for want of prosecution with judgment for costs after thirty days notice given by the clerk to the attorneys of record unless, for good cause shown, the court orders otherwise."

Plaintiff asserts that this local Rule 11 is invalid for the reason that it is "inconsistent" with Rule 41 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., and is therefore violative of Rule 83, F.R.C.P. Rule 41 (b) provides, among other things, for the dismissal of an action on motion of the defendant for failure of the plaintiff to prosecute. Rule 83 provides for the adoption by the district court of rules governing its practice "not inconsistent" with the federal rules, and that in "all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." Plaintiff's contention is without merit. Local Rule 11 merely provides for the dismissal of an action for want of prosecution by the court on its own motion, and we find no inconsistency therein with Rule 41 (b). Furthermore, it is within the court's inherent power to so dismiss an action without authority of statute or rule. *Hicks* v. *Bekins Moving & Storage Co.*, 9 Cir., 115 F. 2d 406, 408, 409 (1940). We hold local Rule 11 to be valid.

Plaintiff's next contention is that if local Rule 11 is valid, it was nevertheless an abuse of discretion on the

part of the district court to refuse to vacate the dismissal under the fact situation set out in his motion. We have examined this motion and it shows in substance that plaintiff has been a practicing attorney in Hammond, Indiana; that continuously since January 3, 1957, he has been under a continuous and heavy burden of trial work which could not be avoided or delayed, naming a case in each of three federal district courts in Chicago, Illinois, in Miami, Florida and in Puerto Rico; that due to this situation and the burden of other litigation he overlooked the requirement of taking action in this case under Rule 11; that "if it had not escaped his attention it would not have been possible anyhow to take such action within said time, due to the aforesaid situation of the plaintiff"; that, although he had counsel of record, he had taken the responsibility for conducting the litigation and his counsel relied on him to take such action; that he has always intended to prosecute this action to trial but was delayed in so doing because of his heavy professional burden and the great amount of trial preparation necessary in this case, and for the further reason that he did not consider it appropriate to press the action during the past several years while defendant was extricating itself from financial difficulties. We have examined the motion in full and find no showing therein to justify a holding that the district court abused its discretion in denying relief under Rule 60 (b).

We have set out the record of the proceedings in detail and need not comment on its further at length. It is sufficient to repeat that plaintiff filed his action on December 31, 1952 and took no further action in court, except in 1956 with reference to defendant's interrogatories and requests for admissions, until he filed his motion to vacate the order of dismissal on June 21, 1957. It is significant to note that he completely ignored the notice on May 2, 1957 that the cause would be dismissed on June 6, 1957 "unless prior thereto, for good cause shown, the court orders otherwise." Under all the circumstances presented to the district court we hold that it did not abuse its discretion in denying plaintiff's motion to vacate the order of dismissal.

Plaintiff asserts that the district court erred in overruling his motion for the judge to disqualify himself. Since we have held that the order denying relief under Rule 60(b) is a final disposition of the case reviewable by this court, we will also review the action of the district judge in refusing to disqualify himself under 28 U.S.C.A. § 455. This section provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he * * * is * * * so related to or connected with any party * * * as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Plaintiff's motion for disqualification charges that Judge Grant, while in the active practice of law in South Bend, Indiana, during a period from about 1950 to about 1954 or 1955, was employed on a salary and expense basis by defendant in connection with the procurement or negotiation of government contracts in Washington, D. C., to supply motor vehicles and other equipment to the military or other governmental agencies, and for that reason cannot be disinterested and impartial in this case. We have set out defendant's admission of the prior employment and Judge Grant's response in his order denying plaintiff's motion. Plaintiff cites no cases supporting his contention that, under the circumstances, the judge acted improperly in refusing to disqualify himself.

There is no claim that Judge Grant was ever of counsel in this case or had any interest in it. The claim is that he was employed as an attorney for defendant for a period of about four years ending at the close of 1954. (He assumed the federal district bench in September, 1957.) Shall a judge, who formerly was an active practicing attorney, feel compelled to disqualify himself from hearing matters in which any of his clients of former years may be parties? This has been answered in *Cox v. Fife*, 156 U.S. 494, 498 (1894), where the Supreme Court of the United States said:

> "* * * the ground of objection was that the judge had been, prior to his appointment, attorney for

some of the defendants on matters not connected with the present case, we do not perceive that he was disqualified from trying the cause. *In such a state of facts, the judge must be permitted to decide for himself whether it was improper for him to sit in the trial of the suit.*" (Our emphasis.)

This is a case involving a matter of judgment to be determined by the judge within his own conscience. We find no error in his refusal to disqualify himself.[2]

The orders appealed from are

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[2] For an interesting summary of related questions, see *Green* v. *Murphy*, 3 Cir., 259 F. 2d 591 (1958).

FILE COPY

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APR 23 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

NO. 815

JAY E. DARLINGTON,
Petitioner,

vs.

STUDEBAKER-PACKARD CORPORATION,
Respondent.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals For the Seventh Circuit

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TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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JAY E. DARLINGTON,

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Respondent.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals For the Seventh Circuit

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named Respondent respectfully contends and urges that the Petition for Writ of Certiorari be denied for reasons given hereinbelow.

STATEMENT OF FACTS

Petitioner-plaintiff's action was for patent infringement brought on a design patent. The design patent does not require consideration here on the merits because plaintiff-petitioner's action was dismissed in the District Court before trial for failure of prosecution. The dismissal was

affirmed on appeal to the Court of Appeals and plaintiff-petitioner's Petition for Writ of Certiorari is limited to matters relating to the dismissal brought about by his failure to prosecute his case.

The pertinent facts of the case can be shown very nicely in outline form, with emphasis on the sequence of the action taken, and such an outline is set forth below in lieu of stating the facts in narrative form:

12-31-52 Complaint filed (Rec. App. 1a-2a)

2-20-53 Answer filed (Rec. App. 3a-8a)

No affirmative or positive action by plaintiff-petitioner for more than 4 years between the time the complaint was filed and the action was dismissed for failure of prosecution.

5- 2-57 Notice by clerk of District Court under Local Rule 11 (Petition, p. 4) of that court that cause would be dismissed 6-6-57 unless for good cause shown the court orders otherwise (Rec. App. 36a).

Plaintiff-petitioner made no response to this notice issued under Local Rule 11.

6- 6-57 Order signed by the Honorable W. Lynn Parkinson dismissing the action for failure of prosecution (Rec. App. 37a).

6-21-57 "Motion to Vacate Dismissal" by plaintiff-petitioner. Contains (1) excuses for his failure to respond to the 5-2-57 notice under Local Rule 11 and (2) excuses for his failure to prosecute his case.

Sept. 1957 The Honorable Robert A. Grant appointed judge of District Court for Northern District of Indiana (Pet. App. 6a).

3-14-58 Oral argument on "Motion to Vacate Dismissal" before Judge Grant at which plaintiff-petitioner raised question of validity of Local Rule 11 for first time. Plaintiff-petitioner given opportunity to file memorandum of authorities on his "Motion to Vacate Dismissal" (Rec. App. 41a).

4-14-58 "Plaintiff's Verified Motion for the Judge to Disqualify Himself" based on allegations that Judge Grant was previously employed by defendant-respondent in connection with the procurement or negotiation of government contracts for defendant-respondent to supply motor vehicles and other equipment to the United States Government (Rec. App. 42a-45a).

4-26-58 Defendant-respondent admits in a memorandum brief that Judge Grant was retained by it from July 1950 to the end of 1954 for matters not connected to the present case (Rec. App. 47a-50a).

5- 8-58 Order by Judge Grant denying motion that judge should disqualify himself (Rec. App. 50a).

5- 9-58 Order by Judge Grant denying the "Motion to Vacate Dismissal" for the reasons (1) plaintiff asserted only frivolous reasons for having completely ignored the May 2, 1957 notice issued pursuant to Local Rule 11 and (2) plaintiff failed to prosecute his action with reasonable diligence and had asserted only frivolous reasons for not having prosecuted his suit (Rec. App. 51a).

6- 7-58 Plaintiff-petitioner appealed the 5-8-58 and 5-9-58 orders to the Court of Appeals (Rec. App. 52a).

1- 2-59 The Court of Appeals affirmed the two orders appealed from (Pet. App. 1a-7a).

QUESTIONS PRESENTED FOR REVIEW

Plaintiff-petitioner has presented three questions for review which are as follows:

I. The issue of the validity of Local Rule 11 under which his case was dismissed for failure of prosecution.

II. The issue of whether plaintiff-petitioner's excuses for his failure to file a timely response to the clerk's notice pursuant to Local Rule 11 were sufficient under Federal Rule of Civil Procedure 60(b) to warrant vacating the dismissal order.

III. The issue of the denial of plaintiff-petitioner's motion for the disqualification of the judge.

There is a very important question which plaintiff-petitioner did not present for review:

IV. The issue whether plaintiff-petitioner's excuses for failing to prosecute his case set forth in his "Motion to Vacate the Dismissal" were sufficient to warrant vacating the dismissal order to give him the opportunity to begin prosecuting his case.

Issue IV was decided in favor of defendant-respondent in the District Court Order dated May 9, 1958 which was affirmed by the Court of Appeals. The reason for bringing this up is that plaintiff-petitioner has conceded Issue IV by not presenting it as a question for review and this concession automatically makes Issues I and II moot questions. Any action by this Court on Issues I and II favorable to plaintiff-petitioner could not be of any benefit to him because his case would still stand dismissed by reason of Issue IV having been decided in favor of defendant-respondent by the District Court and the Court of Appeals.

ARGUMENT

Issue I—Validity of Local Rule 11

Plaintiff-petitioner has challenged the validity of Rule 11 (Petition, p. 4) of the District Court. Local Rule 11 pertains to the matter of dismissing cases where there is a failure of prosecution and the test of its validity is whether the District Court has the power and authority to adopt the rule. As the Court of Appeals has affirmed the validity of Local Rule 11, the question presented for this Court is whether the adoption of Local Rule 11 represents a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision under Supreme Court Rule 19.

Plaintiff-petitioner's reasons for urging the invalidity of Local Rule 11 may be summarized by the following two points:

(1) That Local Rule 11 is inconsistent with Rule 41(b) of the Rules of Civil Procedure and that Rule 83 of the Rules of Civil Procedure prohibits such inconsistency.

(2) That Local Rule 11 makes it possible for a case to be dismissed in an automatic manner without personal attention being given the merits and contents of the case by the court.

With regard to the first contention, a case directly in point is *Hicks* v. *Bekins Moving & Storage Co.*, CCA 9, 115 F.2d 406, 408, 409. Local Rule 48 of the district court in that case is quoted on page 407 and reads, in part, as follows:

"Provided further, that all cases which have been pending in this Court for more than one year without any proceeding of record having been taken may be dismissed by the Court on its own motion for want of

prosecution, at the call of the calendar at the beginning of each term."

The clerk in the Hicks case notified counsel for plaintiff that the case would be called for dismissal for want of prosecution under Local Rule 48 and, no one appearing, an order of dismissal was entered. On appeal, after a motion to vacate the dismissal was denied, a specific issue was whether the lower court had power to enter an order of dismissal on its own motion under Local Rule 48 in that case for plaintiff's failure to prosecute his case. In discussing FRCP 41(b) the court states on page 408:

> "This rule does not specifically provide that a court may dismiss, of its own motion, for failure to prosecute, but apparently does not limit dismissals to those instances enumerated therein for it says 'any dismissal not provided for in this rule,***.'"

The appeal court then concluded on page 408 that under FRCP Rule 83 (which provides that each district court may make rules governing its practice not inconsistent with the Rules of Civil Procedure) a district court has the power to provide for dismissal of causes for lack of prosecution by the court of its own motion.

The Hicks case on page 408 thereof contains the following quotation and discussion on the point in question:

> "Mr. George Longsdorf, in his Cyclopedia of Federal Procedure, vol. 5, Sec. 1506, p. 80, says that: 'It is the settled rule in the federal courts that an action at law may be dismissed for want of prosecution or other delay fatal to the continuance of the action. Dismissal on such ground is discretionary with the courts, and within their inherent power, independent of statute or rule. In many of the districts, however, the matter is regulated by local rules, or general or standing orders applying to all cases in which no action has

been taken for a specified period.' The same thought is expressed in 18 C.J. Sec. 110, pp. 1191, 1192; and in 17 Am. Jur. Sec. 57, p. 88 * * *. The statements of the text writers are, of course, drawn from the decisions of the courts. The District Court of the United States for the District of Colorado had a rule similar to that of the court below providing for dismissal for want of prosecution and entered an order of dismissal pursuant to the rule. An appeal followed and the Circuit Court of Appeals for the Eighth Circuit said: 'this is a very proper rule, but in the absence of such a rule, every court has the power to dismiss a cause for want of prosecution. It is a matter of judicial discretion, and is frequently exercised.' * * * This power to dismiss for want of prosecution may be exercised by the court of its own motion, though no action to secure such result be taken by the defendant."

The Hicks case is cited with approval in several later cases which are not referred to herein. Many other cases could also be cited which hold that a court has the inherent power to dismiss a case for failure to prosecute on its own motion but is not considered necessary, especially since plaintiff has not cited any cases in which this question was in issue to support his position.

Plaintiff-petitioner cites *Hackner* v. *Guaranty Trust Co. of New York*, CCA 2, 117 F.2d 95, to support his position that Local Rule 11 is invalid and that a case can be dismissed for failure of prosecution only pursuant to a motion by defendant under FRCP 41(b). The Hackner case involves the specific question of whether an action should be dismissed where there is insufficiency of the service of process after a complaint is filed and not the question of the validity of a local rule utilized to dismiss a case for failure to prosecute. Plaintiff-petitioner relies heavily on a loosely worded remark in the case that an action once commenced by the filing of a complaint remains pending until dismissed

by the court under Rule 41(b) for lack in diligence in prosecution. This is only dicta because the matter of the different modes for dismissing a case for failure to prosecute was not involved in the Hackner case. The court in that case ruled in effect that it was error for the district court to dismiss plaintiff's action on the grounds that the service of process after the complaint was insufficient. In connection with this ruling the court made the broad remarks that an action remains pending after the complaint is filed until dismissed under Rule 41(b) but it is clear that this was too broad a statement for the point the court was making. The point the court was making was that plaintiff's case should not have been dismissed on the grounds that the service of process was insufficient and this could have been stated positively instead of with the overly broad negative statement made by the court.

Plaintiff-petitioner also cites *Messinger* v. *United States*, CCA 2, 231 F.2d 328 as supporting his position that only FRCP 41(b) can be utilized to dismiss a case for failure of prosecution. The Messinger case also includes loosely worded remarks to the effect that an action remains pending until dismissed for failure of prosecution under FRCP 41(b). These remarks, while not accurate, were directed to the specific matter of the service of process after the complaint is filed. The remarks are necessarily dicta because in the Messinger case the action was in fact dismissed pursuant to a motion by defendant under Rule 41(b) and thus the question of whether plaintiff's cause could be dismissed in any other manner, such as on the motion of the court based on its inherent power to dismiss a case for failure of prosecution, was not an issue in the case.

With regard to plaintiff-petitioner's second contention, that Local Rule 11 permits a case to be dismissed in an

automatic manner, it is believed that such contention is completely without merit. Defendant-respondent contends that this criticism is not valid because the rule provides a plaintiff with the opportunity to show cause within thirty days why a case shouldn't be dismissed. If a plaintiff responds by presenting reasons why he hasn't prosecuted his case he is given the personal attention of the judge which the plaintiff in this case believes is so important, and rightly so. The device of permitting a plaintiff to show cause why his case shouldn't be dismissed for failure of prosecution certainly safeguards the rights of a plaintiff and his case will not be dismissed "automatically" if he responds to the show cause notice.

It is settled law in the federal courts that courts have the inherent power to dismiss cases for failure of prosecution independently of statutes or rules and that rules, such as Local Rule 11, may be adopted for implementing and administrating this inherent power. There is thus no grounds for the exercise of this Court's supervisory power on this issue pursuant to Supreme Court Rule 19.

Issue II—Failure of Plaintiff to Respond to Notice Sent Under Local Rule 11

Plaintiff-petitioner filed his complaint December 31, 1952 and thereafter took no action whatsoever for a period of four and one-half years to prosecute his case other than a single instance in April 1956 when he filed responses to defendant-respondent's requests for admissions and interrogatories. The case was finally dismissed on June 6, 1957 for failure of prosecution.

The dismissal was pursuant to District Court Rule 11 (see Petition, page 4, for text) which provides for the dismissal of cases in which no action is taken for more than a year. Rule 11 was implemented with a notice (Rec. App.

37a) dated May 2, 1957 and signed by the Clerk to the effect that the cause would be dismissed on June 6, 1957 unless for good cause shown the court orders otherwise. Plaintiff-petitioner ignored and made no response to the May 2, 1957 show cause notice and the case was subsequently dismissed by an Order (Rec. App. 37a) signed by the Honorable W. Lynn Parkinson (then District Judge and since appointed to Court of Appeals) dated June 6, 1957.

A motion (Rec. App. 38a) by plaintiff-petitioner to vacate the dismissal filed June 21, 1957, presumably pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, alleges that the dismissal occurred because of "mistake, accident and excuseable neglect." The motion shows that it is undisputed that plaintiff-petitioner received the show cause notice and that his only excuse for not responding to it were reasons to the effect that he "overlooked" the requirement to take action and "if it had not escaped his attention" it would not have been possible to take action in the time allowed due to a heavy and continuous burden of trial work for his clients, plaintiff-petitioner being a practicing attorney in Hammond, Indiana.

One of plaintiff-petitioner's reasons, identified as (1)(b) on page 2 of petition, for urging that a writ of certiorari be granted is that it was an abuse of discretion for the District Court to deny his motion pursuant to FRCP 60(b) to vacate the dismissal. In order to prevail on this point plaintiff-petitioner has the burden of showing, pursuant to Supreme Court Rule 19, that the Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings by the District Court in denying said motion as to call for an exercise of this Court's power of supervision. In order to determine whether the District Court's order denying the motion was a departure

from the accepted and usual course of judicial proceedings it appears necessary to compare the showing of "excuseable neglect" set forth in the "Motion to Vacate Dismissal" to what was actually required in prior cases which established precedents which District Courts must look to for guidance.

The cases decided under Rule 60(b) hold that very special circumstances are required to be shown to relieve a party from a judgment or an order entered as a result of failure of a party to take action required by a court such as response to a notice to show cause why a case shouldn't be dismissed due to lack of prosecution.

If inadvertence is relied on, the cases hold that relief should be denied on the ground of inadvertence unless excuseable neglect is shown. *Ledwith* v. *Storkan*, D.C.Neb., 2 F.R.D. 539, 542-545. In the *Ledwith* case a default judgement was entered against the defendant Storkan because of failure to file an answer to the complaint. The defendant Storkan sought relief under Rule 60(b) on the basis of "excuseable neglect" stating that the complaint had been turned over to an attorney and the attorney negligently failed to take any action. In denying the relief requested the court sets forth a comprehensive résumé of what constitutes "excuseable neglect" under Rule 60(b).

The court stated that Rule 60(b) is supposed to have its source in a comparable provision in the California code and makes reference to the following situations which were held not to constitute "excuseable neglect":

1. That the pressure of other business, the distracting intervention of Sunday, and the confusion of a pleading among papers in an attorney's office are inadequate to show excuseable neglect.

2. The preparation of an answer and the failure to file it under the mistaken impression that it was filed is

not such inadvertence or excuseable neglect as will support relief from the consequences of failure to make the filing.

3. The negligence of a defendant was not excuseable who had requested his business partner to attend to his defense of a suit after which he forgot about the suit until after he had suffered a default judgment to be entered.

4. That an attorney employed by the party, on receiving a cross complaint, delivered it to his stenographer with instructions only to place it in the office files but took no further step respecting answer, whereupon his client was defaulted.

5. That "excuseable neglect" was not shown by the fact that counsel was under unusual pressure of work, and that his health was poor, though not bad enough wholly to preclude him from attending to any business.

6. That a showing that one of the attorneys for the defaulted party prepared an amended complaint during a period of illness of the stenographer of an associate attorney and mistakenly thought it had been transmitted by mail for filing, when in fact the stenographer's illness had prevented such mailing, was inadequate to disclose excuseable neglect.

The court in the *Ledwith* case, pages 544 and 545 thereof, made the following comments with regard to the above six illustrations concerning the requirements for a showing of excuseable neglect:

"Citations to like effect (refers to 1 to 6 above) might be accumulated but the effort would serve no practical purpose. Save in those cases where the court has granted its indulgence without real study, and as if the vacation of the judgment were virtually an arbitrarily demandable right of the delinquent party, there is no practical difference of opinion upon the point that neglect or inadvertence resulting in default will not

alone justify the vacation of the ensuing judgment. The neglect or inadvertence must be excuseable, and real and practical grounds for excuse must be factually shown in support of the motion. • • •

Precisely what circumstances will avail to render the neglect of a counsel excuseable may not be adequately set down. But some measure of excusability may be gotten from decisions where relief has been granted. They include (a) continuous preoccupation with the trial of a distracting first degree murder case, (b) reliance on assurance by the court or a clerk thereof or opposing counsel as to the time of a trial, (a) failure to reach the place of trial in consequence of casualties in traffic, (d) sudden illness of counsel, (d) unanticipated summons to the bedside of a dying relative, and other like incidents. In each instance there was inadvertence or neglect which intercepted the timely performance of a required act, but there was likewise some disturbing and distracting event which rendered the error excusable. • • •

But the admonition towards indulgence in the exercise of an allowable discretion must not betray the court into a meddling manifestation of assumed discretion in circumstances which, under the rules, do not bring discretion into operation. Much less should it be resorted to in support of an indefensibly sympathetic appraisal of an attempted showing of "inadvertance or excuseable neglect". If the showing be inadequate to fairly establish such "inadvertance or excuseable neglect", the simple, even if sometimes unpleasant, duty of the court is to find accordingly and deny the relief sought."

Plaintiff-petitioner in the present case does not deny that he was aware of the notice to show cause but only states vaguely that he "overlooked the requirement of taking action." He must therefore be charged with being aware of the notice and, being himself a lawyer with substantial experience in the federal courts, is also chargeable with

knowing the consequences of ignoring a notice to show cause. From the statements in plaintiff-petitioner's motion to vacate the dismissal it is clear that he made a free, calculated, deliberate choice to ignore the notice to show cause. Free, calculated, deliberate choices are not to be relieved from under the rule governing relief from judgment or order. *Ackerman* v. *U. S.*, Tex. 1950, 71 S.Ct. 209, 211; 340 U.S. 193, 197; 95 L.Ed. 207. As plaintiff-petitioner in effect admitted that he made a free, calculated, deliberate choice not to respond to the notice to show cause, he is thus precluded from showing "excuseable neglect" as a reason for vacating the dismissal order. There are many cases decided under Rule 60(b) which turn on whether a showing of "excuseable neglect" is made out. All of these cases hold in effect that the neglect must be due to very special circumstances which understandably excuse the omission of a required action and do not include carelessness or inattention to one's affairs. *Fischer* v. *Dover S.S. Co.*, CCA 2, 218 F.2d 682, 683; *Ken-Mar AirPack, Inc.* v. *Toth Aircraft and Accessories Company*, D.C.Mo. 12 F.R.D. 399, 400; *United States* v. *Klapprott*, DC.N.J., 9 F.R.D. 282, 288; *Italian Cook Oil Corp.* v. *Charles A. Krause Mill Co.*, D.C.Pa., 10 F.R.D. 510, 511.

Another case held that it was an abuse of discretion to open or vacate a judgment where a moving party does not show legal ground therefore or does not offer any excuse for his own neglect or default. The court stated that a showing of mere carelessness or neglect does not constitute either inadvertence or excusable neglect sufficient to warrant vacation of a default judgment. *Federal Enterprises* v. *Frank Allbritton*, D.C.Mo., 16 F.R.D. 109, 112.

In view of above precedents which the District Court was required to follow, and in view of the fact that the only excuse plaintiff-petitioner had for ignoring the notice to

show cause was that he "overlooked" it and that he was busy with other litigation, the only reasonable and logical decision the District Court could arrive at is that plaintiff-petitioner had not presented any reasons of sufficient substance to make out a showing of "excuseable neglect" as required by FRCP 60(b). Certainly this decision of the District Court can in no way be judged to be a departure from the accepted and usual course of judicial proceedings and plaintiff-petitioner, who has the burden of showing such a departure under Supreme Court Rule 19 if he is to prevail, has not shown that there was such a departure.

Issue III—Disqualification of Judge

This issue concerns whether the District Court erred in its May 8, 1958 order (Rec. App. 50a) denying plaintiff-petitioner's April 14, 1958 motion (Rec. App. 42a-45a) for the Honorable Robert A. Grant to disqualify himself with regard to ruling on plaintiff-petitioner's June 21, 1957 motion (Rec. App. 38a-40a) to vacate the June 6, 1957 order (Rec. App. 37a) of the Honorable W. Lynn Parkinson dismissing the case on the grounds of failure of prosecution.

The Court of Appeals affirmed the May 8, 1958 order of the District Court and the question for this Court is whether, in view of Supreme Court Rule 19, this affirmance of the Court of Appeals sanctioned a departure of the District Court from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision.

It is the position of defendant-respondent that the record shows that in view of the circumstances, the statutes involved (28 USCA 144 and 28 USCA 455, see Petition, p. 7 for text) and the precedent cases, that there was no abuse of discretion by the District Court. The burden is on plaintiff-petitioner to show that the District Court made a departure from the usual course of judicial proceedings.

Defendant-respondent relies herein mainly on the same reasons given in its memorandum brief on this point in the District Court which is reproduced in the Record Appendix (Rec. App. 47a-50a) and need not be repeated here. *Carr v. Fife*, 44 F. 713, referred to therein, was affirmed by the Supreme Court as indicated in the decision of the Court of Appeals in this case (Rec. App. 6a).

The retainer of Judge Grant by defendant-respondent for matters not connected to the present case is the basis for plaintiff-petitioner's motion for Judge Grant to disqualify himself. Set forth below is a simple outline with events listed in the order in which they occurred which is intended to show that the retainer of Judge Grant was an activity that was remote and had absolutely no connection with the present case.

6-14-49 Design patent 154,192, the patent in suit, issued to Tucker Corporation

7-1-50 *Judge Grant, then a practicing attorney in South Bend, Indiana, retained by former Studebaker Corporation for matters having no connection with the present case. (Rec. App. 47a)*

7-17-51 Design patent 154,192 purchased by plaintiff-petitioner (Rec. App. 1a)

9-7-51 Letter from plaintiff-petitioner to defendant-respondent giving notice of alleged infringement (Rec. App. 3a and 4a).

12-14-52 Design patent 154,192 expired.

12-31-52 Complaint filed (Rec. App. 1a-2a).

2-20-53 Answer filed. Defendant-respondent represented by attorneys George N. Beamer of South Bend, Indiana and John H. Dienner, Arthur C. Johnson and Edward C. Grelle of Chicago, Illinois (Rec. App. 3a-8a).

12-31-54 *Retainer of Judge Grant terminated by Studebaker-Packard Corporation (Rec. App. 47a).*

3-4-55 Studebaker-Packard Corporation substituted as defendant for predecessor Studebaker Corporation (Rec. App. 8a).

4-15-55 Undersigned attorney began employment with Studebaker-Packard Corporation.

6-6-57 Order by Judge Parkinson dismissing case for failure of prosecution. (Rec. App. 37a)

Sept. 1957 Judge Grant appointed as judge in District Court for Northern District of Indiana. (Pet. App. 6a)

One argument of plaintiff-petitioner appears at page 23 of the Petition where it is stated, with reference to the retainer, that "This apparently was not a routine legal retainer but one of confidential and important nature, as shown in plaintiff's motion." This argument appears to be of no pertinence because whether or not the retainer was of a confidential and important nature does not appear to be at all relevant to the question of whether Judge Grant was so "connected with any party—as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein," as required by 28 USC 455.

Plaintiff-petitioner further states (Petition, p. 23) that the fact that the undersigned attorney admitted that he knew nothing of the retainer corroborates the surmisal that the retainer was of a "confidential and important nature." While it is not in the record, the undersigned attorney began his employment with defendant-respondent company April 15, 1955, after the retainer was terminated, and from the fact that he knew nothing of the retainer it can be equally inferred that the retainer was of so little importance that it did not come to his attention. The undersigned attorney does not intend to be facetious but

only desires to illustrate the fallaciousness of plaintiff-petitioner's arguments.

Plaintiff-petitioner states (Petition, p. 24) that defendant-respondent could and should have filed a frank factual response to plaintiff's motion in this "unusual situation." It is believed that defendant-respondent was more than fair in volunteering information regarding the retainer, especially since it was not obligated to do so. Plaintiff-petitioner's motion for Judge Grant to disqualify himself was based on the allegation that Judge Grant was formerly employed by defendant-respondent in connection with the procurement or negotiation of government contracts in behalf of defendant-respondent and, as this was an unrelated matter and not a reason under 28 USC 455 for the disqualification of Judge Grant, the motion for discovery under Federal Rule of Civil Procedure 34 to obtain detailed information about this unrelated matter can be characterized as a "fishing expedition" and was properly denied. Regardless of the minute details of the retainer which plaintiff-petitioner might have gleaned if discovery had been allowed, the final decision as to whether or not Judge Grant was to be disqualified rests with the judge and his opinion was not subject to being changed by whether or not the details of the unrelated retainer were known to plaintiff-petitioner.

Plaintiff-petitioner's argument (Petition, pages 25 and 26) that the record raises a strong factual inference that Judge Grant did have a "peculiar, unexplained connection" with the subject matter of this action is entirely baseless. With reference to the outline of events, supra, page 16 hereof, the retainer of Judge Grant from July 1, 1950 to December 31, 1954 began 2½ years before the complaint was filed (December 31, 1952) and did not terminate until 2 years after the patent in suit expired (December 14,

1952). Judge Grant is not a patent lawyer by training and it is difficult to even imagine what "behind the scenes function" he could possibly have in the subject matter of this suit.

Plaintiff-petitioner's motion for disqualification of Judge Grant only alleges that the Judge was previously retained by defendant and, as this was admitted by defendant-respondent, there is no showing of good cause under FRCP 34 to justify a discovery order to permit plaintiff-petitioner to make a promiscuous search for some secret and unknown connection between Judge Grant and defendant-respondent which would force the Judge to disqualify himself. The doctrine plaintiff-petitioner is in effect proposing is that whenever a former client of a judge has a case before the judge, the opposing party shall have the unqualified right, without the necessity of showing good cause, to use discovery procedures to obtain information as to all the detail of the previous legal matters the judge handled for the former client. Plaintiff-petitioner has not referred to or cited any authorities which would lend support to this doctrine.

Plaintiff-petitioner cites 28 USC 144 (Petition, p. 7) having to do with the disqualification of a judge where a judge is biased or prejudiced for or against either party but plaintiff-petitioner has not presented any argument as to how this statute applies in this case. Plaintiff-petitioner's motion does not allege any such bias toward plaintiff-petitioner but only that at the March 14, 1958 hearing on the motion to vacate the dismissal plaintiff-petitioner was "convinced" that Judge Grant had a "preconceived prejudice and hostile attitude toward his case." Even if this allegation were true it would not present grounds for disqualification under either 28 USCA 144 or 28 USCA 455 because neither of these statutes are concerned with the at-

titude a judge takes toward a party's case, after the judge has reviewed it. After a judge has reviewed a case and formed some ideas regarding it, it is not an abuse of discretion to inform a party of his views at some intermediate point in the proceedings.

Plaintiff-petitioner alleges in his motion for disqualification of the judge (Rec. App. 44a) that Judge Grant stated at the March 14, 1958 hearing that he was only interested in the law question of the alleged conflict between Local Rule 11 and FRCP 41(b). It is to be noted however that pursuant to the hearing Judge Grant, in an Entry (Rec. App. 41a) dated March 14, 1958, gave plaintiff-petitioner the opportunity to file a memorandum of authorities in support of plaintiff-petitioner's motion to vacate the dismissal and there was no qualification that the memorandum be limited to the question of the alleged conflict between Local Rule 11 and FRCP 41(b).

In view of the above it is submitted that Judge Grant's refusal to disqualify himself, and the implicit denial of a discovery order, were well within the proper exercise of his discretion. It is clear that there was no departure from the accepted and usual course of judicial proceeding to call for the exercise of this Court's power of supervision under Supreme Court Rule 19.

Issue IV—Failure of Plaintiff to Prosecute His Case.

Of the questions presented for review by plaintiff-petitioner, questions 1(a) and 1(b) set forth on page 2 of the Petition correspond to Issues I and II herein.

The May 9, 1958 Order (Rec. App. 51a) of the District Court denying the motion to vacate the dismissal (Rec. App. 38a) has two prongs in that it presents two grounds for denying the motion.

One ground is that the motion to vacate the dismissal only asserted frivolous reasons why plaintiff-petitioner ignored the May 2, 1957 show cause notice (Rec. App. 36a) and thus the burden of showing "excuseable neglect" under FRCP 60(b) for not responding to the show cause notice was not met by plaintiff-petitioner.

In presenting the questions for review by this Court plaintiff-petitioner attacks the Order and the action of the District Court only from the standpoint that Local Rule 11 was invalid or, in the alternative, that the District Court abused its discretion in the application of Local Rule 11.

It is to be noted, however, that the May 9, 1958 Order was also supported by the finding and decision of the District Court that plaintiff-petitioner had failed to prosecute his action with reasonable diligence and that the motion to vacate the dismissal asserted only frivolous reasons for such failure. It is to be specifically noted that nowhere in his Petition does plaintiff-petitioner even argue that his reasons for failing to prosecute his case were sufficient to excuse his failure to prosecute his case. In fact, nowhere in the Petition is this part of the Order even challenged by the plaintiff-petitioner. The only conclusions which can be drawn are (1) the silence of plaintiff-petitioner on this point means that he concedes that the May 9, 1958 Order is supported by the finding that there was no reasonable excuse for his failure to prosecute his case and (2) the questions involved in IA and IB of the Petition (corresponding to Issues I and II herein) relating to Local Rule 11 and the application of this rule are moot.

In other words, it is the position of defendant-respondent that either one of the two grounds referred to above in the May 9, 1958 order denying the motion to vacate the dismissal is sufficient to support the order and, as plaintiff-

petitioner has only challenged the findings with respect to one of the grounds, the May 9, 1958 Order must be allowed to stand.

Although plaintiff-petitioner has chosen not to challenge or argue the finding by the District Court (as set forth in the May 9, 1958 Order) that he failed to present sufficient reasons to excuse his failure to prosecute his case, defendant-respondent believes it would be salutary to at least present a review of this aspect of the case because it is believed to be the essence of the matter before this Court.

Paragraph 2 of plaintiff-petitioner's June 20, 1957 motion (Rec. App. 38a-40a) to vacate the dismissal relates to his reasons for failing to prosecute his case and may be summarized as follows:

> a. Plaintiff's burden of other work from the commencement of the suit (December 31, 1952) until the filing of his present motion (June 20, 1957) to vacate the dismissal has delayed him from prosecuting the case.
>
> b. Prosecution of the case would require a large amount of work by plaintiff.
>
> c. Plaintiff has not considered it appropriate to present this action involving an alleged liability of many millions of dollars against the defendant during the last several years while defendant was extricating itself from financial difficulties.

Plaintiff-petitioner's case had been pending from December 31, 1952 until June 6, 1957 when it was dismissed and during that time he did not take one affirmative or positive step to prosecute it. From the time the complaint was filed defendant-respondent has considered the suit of the nuisance variety and that it was filed with no hope of recovery on the merits but only to force defendant-respond-

ent to make an unjust settlement to avoid the heavy expenses which always accompany patent litigation.

Plaintiff-petitioner states in his motion that he did not feel it was appropriate to prosecute his case during the time that defendant-respondent was extricating itself from financial difficulties. This contention by plaintiff-petitioner is inconsistent with his allegation that the burdens of his other work did not permit the time to prosecute his case.

Regarding the authority of the Court to dismiss plaintiff-petitioner's case in this instance, there are many cases which hold that a court has the inherent power to dismiss a suit on its own motion for want of prosecution. *American National Bank & Trust Co. of Chicago* v. *United States*, CADC, 142 F. 2d 571, 572; *Partridge* v. *St. Louis Joint Stock Land Bank*, CCA 8, 130 F.2d 281, 284; *Sweeney* v. *Anderson*, CCA 10, 129 F.2d 756, 758; *Hicks* v. *Bekins Moving & Storage Co.*, CCA 9, 115 F.2d 406, 409; *U. S. ex rel. Shinn* v. *State of Tenn.*, D.C.Tenn., 74 F. Supp. 635, 637.

The dismissal of a case for lack of prosecution on the court's own motion is similar in almost all respects to the dismissal of a case for lack of prosecution on a motion by defendant under Rule 41(b) of the Rules of Civil Procedure. Cases decided under Rule 41(b) are pertinent to the present case.

The only other matter which remains to be discussed herein is whether plaintiff-petitioner could have shown that he had a sufficient excuse for his failure to prosecute his case. The only excuse he alleged in his motion to vacate the dismissal is that he was continuously busy with his own client's litigation since December 31, 1952 and the present case would have required a large amount of work on his part. This excuse is without merit on its face because the obvious and simple solution would be to retain another

attorney to handle the case for him if he were too busy with other work to handle it himself. If his excuse were considered sufficient then no case would ever be dismissed for failure to prosecute because most people are busy with their own business and affairs such that the opportunity would not present itself to take time to prosecute their own law suits.

The cases examined by defendant-respondent dealing with the sufficiency of an excuse for failure to prosecute a law suit uniformly hold that a plaintiff must make a showing of adequate explanation for his delay.

In *Boling* v. *United States*, CCA 9, 231 F.2d 826, the court made the following statement:

> "The power of the trial court to dismiss a cause where the matter has become stale by virtue of inaction by plaintiff is inherent and has been crystallized by rule. Rule 41(b), Federal Rules of Civil Procedure, 28 U.S.C.A. One of the causes of congestion of the trial dockets is the failure of courts to exercise the authority vested in them thus to dispose of cases which are shaky or unfounded but which are held on the calendar for nuisance value. Since trial judges are hesitant to dismiss such causes of their own motion, for fear of injustice to some litigant, the device of placing cases in which no action has been taken for a considerable time on a docket for dismissal, absent a showing of adequate explanation for the delay, has been used. But even this palliative for the admitted evil has been of little avail, because of the hesitance mentioned above. Because of this fact, an order of dismissal for failure to prosecute will never be set aside unless there has been an abuse of discretion, and, of course, such a situation is not presumed."

In the *Boling* case the case was filed July 31, 1951 and dismissed with prejudice January 14, 1955 for failure to prosecute. In another case a dismissal after delay in prose-

cution of more than 16 months was not reversible error. *U. S.* v. *Bernstein*, CCA 5, 166 F.2d 466.

In *Russell* v. *Cunningham*, CCA 9, 233 F.2d 806, 811, the record before the district court at the time of its judgment dismissing the action with prejudice for failure to prosecute showed delay of 15 months, two continuances, and no sign that plaintiff was any nearer trial in August 1955, when case was dismissed, than in preceding April when case was last continued, or June of previous year, when pretrial order was filed and case set for trial. It was held that the district court did not abuse its discretion in entering such judgment without resorting to contentions or other facts not found in record. In other words, the delay showed by the record in that case was sufficient to warrant a dismissal for failure to prosecute without considering any excuses the plaintiff might be able to show.

The *Hicks* case, CCA 9, 115 F.2d 406, 409, has facts similar to the facts in the present case. In dismissing the appeal the court made the following statements:

> "The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal."

The court further stated, "It was not necessary for the defendants to show specific impairment of their defense, because the law will presume injury from unreasonable delay." See also *Messinger* v. *U. S.*, CCA 2, 231 F.2d 328, 331.

The above cases clearly hold that a plaintiff must make a substantial affirmative showing of an excuse for failure to prosecute his case to justify preventing a dismissal.

Plaintiff-petitioner's only excuses are (1) that since the commencement of the suit in 1952 until it was dismissed in 1957 he was busy with other litigation, (2) the case requires a large amount of work and (3) plaintiff did not want to prosecute the suit while defendant was extricating itself from financial difficulties. Except for the last reason, which cannot be take seriously, plaintiff's excuses are extremely weak. If he had a sincere desire to prosecute his case he certainly could have found ways to do so such as retaining an attorney to prosecute the case for him.

In view of the precedents referred to above to the effect that substantial reasons are required to excuse a plaintiff who has not taken any action to prosecute his case for a long period of time, the District Court was completely justified in finding that plaintiff-petitioner's excuses were too "frivolous" to warrant vacating the June 6, 1957 dismissal order. There thus can be no finding by this Court pursuant to Supreme Court Rule 19 that the Court of Appeals sanctioned such a departure from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision. The May 9, 1958 order of the District Court denying the motion to vacate the dismissal should thus be allowed to stand regardless of what finding this Court makes with respect to question IA and IB of the Petition.

Wherefore, it is respectfully urged that in view of and for the reasons set forth herein, that this Court deny the Petition for Writ of Certiorari prayed for by plaintiff-petitioner.

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